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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1414

ARCHIE JAMES SHUMAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER SHUMAR

JOHN P. PRICE
RICHARD J. DARKO
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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Arguments made for the first time in the Memorandum For The United States In Opposition compel petitioner to file this reply, pursuant to Rule 24(4), Revised Rules of the Supreme Court. The arguments first raised by the government relate to the question whether the action of the Court of Appeals in granting the government's belated and untimely filed Petition For Rehearing was such a

departure from the accepted and usual course of judicial proceedings and so fundamentally unfair as to require review by this Court.

As set out in the Petition, petitioner was convicted in the District Court of three counts. A certified copy of the docket sheet in the Court of Appeals is appended to the original Petition as Appendix D. (A-20 to A-24) On July 31, 1974, the Court of Appeals affirmed the conviction as to Counts II and III but reversed as to Count I. This Petition deals only with Count I.

In footnote three of its Memorandum For The United States In Opposition respondent argues that:

> "In their chronologies both petitioners omit mention of a defense petition for rehearing filed out of time on September 9."

That assertion by the government is erroneous. It is so misleading to this Court as to raise serious questions as to the government's care and diligence in reviewing this record.

The Court of Appeals originally affirmed the convictions on Counts II and III on July 31, 1974. As the docket sheet clearly reveals, on August 26, 1974, the Court of Appeals entered an order extending Shumar's time to petition for a rehearing on Counts II and III until September 9, 1974. The record of proceedings in the Court of Appeals will reveal that the reason for this extension of time to petition for rehearing on Counts II and III was that counsel for Shumar did not receive a copy of the Court's order of July 31 until August 26, 1974. The Clerk of the Court of Appeals apologized in writing to counsel for the delay in notice of the Court of Appeals' original order.

Shumar did petition for rehearing as to Counts II and III within the time as extended by the Court of Appeals. Contrary to the government's assertion, the Petition for Rehearing as to Counts II and III was not filed out of time.

Furthermore, the government fails to recognize that this Petition deals only with Count I of the original charge. Shumar's Petition for Rehearing to which the government makes reference dealt only with Counts II and III. There would have been no reason for Shumar to have petitioned for rehearing on Count I; the conviction on Count I had been reversed by the Court of Appeals at the time in question.

For the government to attempt to justify its admittedly out-of-time Petition for Rehearing as to Count I upon the basis of actions taken by Shumar in seeking a rehearing of Counts II and III would be a direct violation of Shumar's right to due process of law under *North Carolina v. Pearce,* 395 U.S. 711 (1969). A defendant may not be penalized for having sought a rehearing and review of his conviction.

Furthermore, the government's attempted reliance upon Rule 26(b), Federal Rules of Appellate Procedure, to permit the government's untimely Petition for Rehearing is not supportable.

That Rule specifically requires "good cause" to enlarge the time to do any act. This Court granted the Petition for a Writ of Certiorari in *Iannelli v. United States,* —— U.S. ——, 95 S.Ct. 1284 (1975), on May 28, 1974. From that date forward, the government had knowledge that this Court would consider the question ultimately decided in the *Iannelli* case. Certiorari was granted in *Iannelli* before the July 31, 1974, decision of the Court of Appeals in the Shumar case.

At the time the government filed its untimely Petition for Rehearing it had no "good cause" to justify its belated action. Only a lack of diligence on the part of the government prevented it from filing a timely Petition for Rehearing in the Court of Appeals. Such dilatory tactics would not be acceptable on the part of a criminal defendant, and should not be countenanced when taken by the government in a criminal case.

The government admits in its Memorandum that its Motion for Rehearing, after the Court of Appeals had reversed the conviction on Count I, was untimely filed. Petitioner respectfully urges this Court to grant certiorari to review the affect of such unauthorized action by the government in criminal litigation.

Respectfully Submitted,

/s/ RICHARD J. DARKO

Richard J. Darko

BINGHAM SUMMERS WELSH & SPILMAN
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204
(317) 635-8900

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Petitioner Shumar has been served upon the following counsel, pursuant to Rule 33 (1) (3) (b), Revised Rules, Supreme Court of the United States, by depositing three copies of the same for each counsel in the United States mail with first class airmail postage prepaid.

Solicitor General
Department of Justice
Washington, D.C. 20530

Stanley B. Miller
District Attorney
United States Court House
Room 246
Indianapolis, Indiana 46204

Edward F. Kelly
Riley Towers
225 East North Street
Indianapolis, Indiana 46204

K. Edwin Applegate
321 E. Kirkwood
Bloomington, Indiana 47401

James Manahan
129 E. Market Street
Indianapolis, Indiana 46204

Dated this 28th day of July, 1975.

/s/ RICHARD J. DARKO

Richard J. Darko
2700 Indiana Tower
One Indiana Square
Indianapolis, Indiana 46204